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TENAGA NASIONAL BHD v. KEAN BENG LEE INDUSTRIES (M) SDN BHD

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG J
[CIVIL APPEAL NO: PA-12ANCVC-29-07-2017]
2 JANUARY 2018

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UTILITIES: *Electricity – Tampering of meter – Claim for loss of revenue – Notice of claim – Whether in compliance with s. 38(4) of Electricity Supply Act 1990 – Whether notices sent by authorised persons – Whether Sessions Court Judge erred in dismissing claim*

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Pursuant to an inspection by the appellant at the respondent's premises, the appellant discovered that the electricity meter therein was tampered and a police report was lodged on the same day by the appellant. The appellant, thereafter, computed the loss of revenue consequential on the tampering which amounted to RM511,635.44 and accordingly sent a notice ('first notice') to the respondent to claim for compensation. In addition, the respondent's solicitors Messrs Idris & Associates had again sent another notice ('second notice') to the respondent to claim for the same compensation. By reason of the respondent's failure, refusal or neglect to comply with the appellant's claim, the appellant initiated a suit in the Sessions Court ('suit'). The Sessions Court found that the two notices sent by the appellant did not meet the conditions precedent of s. 38(4) of the Electricity Supply Act 1990 ('ESA'). The Sessions Court Judge also found that the second notice was not sent by an authorised person of the appellant. Accordingly, the Sessions Court dismissed the appellant's suit. The appellant, dissatisfied with the decision of the Sessions Court, filed its appeal to the High Court. According to the appellant, the required notice pursuant to s. 38(4) of the ESA may be sent by a duly certified employee of the appellant or by any other person so authorised by the appellant. That notwithstanding, the requirement isn't mandatory but only directory. The appellant nonetheless submitted that the notices which were sent to the respondent complied with the statutory requirement. On the contrary, the respondent argued that the notices were non-compliant and the Sessions Court Judge was correct in her finding and ultimate decision in dismissing the appellant's claim.

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Held (dismissing appeal):

(1) The requirements in s. 38(4) of the ESA are mandatory by the usage of the imperative word "shall" therein. The specified requirement must be strictly complied to safeguard the interest of the consumers that such notices are not simply sent out by unauthorised persons. (paras 17)

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(2) The first notice was a computer generated letter that did not require signature sent by the Jabatan Perkhidmatan Undang-Undang Tenaga Nasional Berhad. There was no evidence whatsoever that it was a statement by an employee of the appellant duly certified by the appellant. In the premises, the mandatory requirement of s. 38(4) of the ESA was unmet. Although a solicitor was in principle qualified as an authorised person, both notices were nonetheless non-compliant because they did not contain and specifically state particulars of the certification or authorisation by the appellant as well as amount claimed. For this reason, both notices did not meet the conditions precedent of s. 38(4) of the ESA. (paras 18, 19 & 21)

Case(s) referred to:
LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Noliana Sulaiman v. PP [2001] 1 CLJ 36 HC ***(refd)***
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***
Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC ***(refd)***
Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd [2015] 6 CLJ 751 CA ***(refd)***
United Asian Bank Bhd v. Dyalchands Sdn Bhd & Ors [1993] 4 CLJ 630 HC ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 37, 38(4), (5)
Rules of Court 2012, O. 33

For the appellant - Fathima Idris; M/s Idris & Assocs
For the respondent - M Kirubanandan; M/s Dharan & Co

[Editor's note: Appeal from Sessions Court; Civil Suit No: B52NCVC-01-05-2014]

Reported by Sandra Gabriel

JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is an appeal against the dismissal of the appellant's claim for loss of revenue that resulted from the alleged tampering of the electricity meter installed in the respondent's premises.

[2] The appellant is a licensee licensed pursuant to the Electricity Supply Act 1990 and plaintiff in Butterworth Sessions Court Suit No. B52NCVC-01-05-2014 ("suit").

[3] The respondent is a private limited company and the defendant in the suit. At the request of the respondent as owner and occupier of the premises bearing address No. 1384, Lot 841, Jalan Tasek, Simpang Ampat, 14100 Penang ("premises"), the appellant supplied electricity to the premises.

[4] After an inspection was carried out by the appellant on 17 February 2012 at the premises, the appellant discovered that the electricity meter therein was tampered and a police report was lodged on the same day by the appellant.

[5] The appellant thereafter computed the loss of revenue consequential on the tampering which amounted to RM511,635.44 and accordingly sent a notice to the respondent dated 14 November 2012 to claim for compensation. In addition, the appellant's solicitors Messrs Idris & Associates again on 8 April 2014 sent another notice to the respondent to claim for the same compensation.

[6] By reason of the respondent's failure, refusal or neglect to comply with the appellant's claim, the appellant initiated the suit on 28 May 2014.

[7] By the application of the respondent dated 28 April 2017 in the suit, the parties sought for the Sessions Court's determination on a point of law pursuant to O. 33 of the Rules of Court 2012. The question of law that was formulated reads:

> Perkara undang-undang itu adalah samada Plaintif telah memenuhi dan/atau mematuhi pra-syarat undang-undang ("condition precedent") yang mandatori menurut Seksyen 38(4) Akta Bekalan Elektrik 1990 ("ABE 1990") iaitu samada Plaintif telah menyampaikan kepada Defendan satu pernyataan bertulis yang telah disahkan seperti yang diperuntukan di bawah Seksyen 38(4) ABE 1990 yang merupakan satu pra-syarat undang-undang sebelum Plaintif memulakan tindakan sivil ini terhadap Defendan sepertimana yang diputuskan oleh Mahkamah Rayuan di dalam kes *Tenaga Nasional Berhad v. Dunia Raya Enterprises Sdn Bhd* [2015] 6 CLJ 751.
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> Bahawa sekiranya persoalan permulaan undang-undang ini diputuskan memihak kepada Defendan iaitu Plaintif telah gagal memenuhi dan/atau mematuhi pra-syarat ("condition precedent") di bawah Seksyen 38(4) ABE 1990 tersebut maka Defendan memohon supaya keseluruhan tindakan Plaintif ini ditolak dengan kos.

[8] The learned Sessions Court Judge on 10 July 2017 allowed the respondent's application with costs of RM3,000. As the result, the suit was dismissed.

[9] The appellant was dissatisfied with the decision of the learned Sessions Court Judge and filed its appeal to the High Court on 18 July 2017.

[10] After reading the record of appeal and written submissions filed by the parties, I heard oral arguments of counsel on 7 November 2017 and thereafter adjourned my decision to deliberate on the arguments advanced by the parties.

[11] On 18 December 2017, I disallowed the appeal with costs of RM3,000.

[12] I now furnish below the grounds of my decision hereinbelow. A

Contentions And Findings

[13] The appellant contended that there was plainly a contractual agreement for supply of electricity between the parties. The Electricity Supply Act 1990 ("ESA") provides as follows in ss. 37 and 38 with emphasis added by me: B

37. Offences

(1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property commits an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both. C

(2) Any person who by any rash or negligent act or omission causes damage to any person or property in respect of any installation or equipment or part thereof commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both. D

(3) Any person who in any manner dishonestly:

(a) abstracts electricity; E

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or F

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity,

commits an offence and shall, on conviction: G

(A) be liable:

(i) in the case of a domestic consumer, to a fine of not less than one thousand ringgit and not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both; and H

(ii) in the case of a non-domestic consumer, to a fine of not less than twenty thousand ringgit and not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both; and

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A (B) be liable for the second and subsequent offence:

(i) in the case of a domestic consumer, to a fine of not less than five thousand ringgit, and not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both; and

B (ii) in the case of a non-domestic consumer, to a fine of not less than one hundred thousand ringgit and not exceeding five million ringgit or to imprisonment for a term not exceeding ten years or to both.

(4) Any person who, in contravention of section 9, uses, works or C operates, or permits to be used, worked or operated any installation commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

D (5) Any person who, in contravention of section 9, supplies electricity from an installation to or for the use of any person commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit, and to a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

E (6) Any licensee who without the express authority from the Commission supplies electricity or lays down any supply line or constructs any electrical work outside the area of supply specified in his licence commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit, and any such unauthorised line or work may, after conviction, be removed by order of the Commission, and if such order is not complied F with, the reasonable costs of such removal may be recovered from the licensee.

(7) Any licensee who without lawful excuse fails to comply with any term or condition expressed in the licence commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, to G a further fine not exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(8) Any person who fails or neglects to register any installation under section 21 commits an offence and shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit and a further fine not H exceeding one thousand ringgit for every day or part of a day during which the offence continues after conviction.

(9) Any person who, without due authority, extinguishes or damages any public lamp or damages or defaces any post, bracket or other means of support of a public lamp commits an offence and shall, on conviction, be I liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding one year or to both.

(10) Any person who without lawful consent of the supply authority or the licensee, as the case may be, affixes or causes to be affixed any advertisement, bill or notice or any paper against or upon, or otherwise defaces any building, post or bracket or other equipment or the enclosure thereof used for or in connection with any public installation commits an offence and shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit.

(11) Any person who wilfully or negligently:

(a) causes electricity to be diverted from its proper course to be wasted; or

(b) breaks, throws down, causes to fall or damages any supply line, post, pole, or other equipment, installation or any part thereof, as the case may be, connected with the supply of electricity,

commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

(12)(a) No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part thereof as may be prescribed, in a manner likely to interfere with any electrical installation or to cause danger to any person or property.

(b) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(13) (a) No person shall install any electrical wiring or extension to existing wiring on any premises without first obtaining the approval in writing from a supply authority or licensee.

(b) Any person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(14) Any person who damages or removes any meter or other instrument used on or in connection with any licensed installation, for recording the output or consumption of electricity commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(15) Any person:

(a) found guilty of any offence against this Act for which no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding twenty-five thousand ringgit and, in the case of a continuing offence, to a fine not exceeding five hundred ringgit for every day or part of a day during which the offence continues after conviction;

(b) who by any act or omission contravenes any provision under this Act commits an offence and if no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit and, in the case of a continuing offence, to a fine not exceeding five hundred ringgit for every day or part of a day during which the offence continues after conviction.

(16) For the purposes of subsection (3):

"domestic installation" means an installation in a private dwelling which is not used in any hotel or boarding house or for the purpose of carrying out any business, trade, profession or service;

"non-domestic consumer" means a consumer of electricity other than domestic consumer;

"domestic consumer" means a consumer in domestic installation supplied or connected with electricity.

38. Disconnection of supply of electricity

(1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

(1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.

(1B) Upon receiving such information under subsection (1), the Commission may verify the matter and in cases where it finds that no offence has been committed, the supply of electricity shall be reconnected immediately.

(2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection.

Provided that the period of disconnection shall not exceed three months.

(2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

(3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), (3) and (14) and any reasonable expenses directly incurred by the licensee under this section including expenses incurred in respect of reconnection of electricity in the manner as have been directed by the Commission:

Provided that and subject to subsection (4), if the licensee does not proceed with a claim for such loss of revenue and expenses in court, the licensee may only claim against the consumer for the said loss of revenue and expenses for a period not exceeding six months retrospectively from the date the offence was discovered under subsection (1).

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:

(a) the amount of loss of revenue or the reasonable expenses incurred by the licensee;

(aa) the manner of calculation of the loss of revenue and items of expenses; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the consumer under subsection (3) and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection.

(5) The amount stated in the written statement under subsection (4) shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[14] By reason of the alleged respondent's tampering of the meter installed in the premises, the appellant sent two notices to the respondent claiming the appellant's loss of revenue as the result of the tampering. According to the appellant, the required notice pursuant to s. 38(4) of the ESA may be sent by a duly certified employee of the appellant or by any other person so authorised by the appellant. That notwithstanding, this requirement is not mandatory but only directory. The appellant nonetheless submitted that the notices which were sent to the respondent complied with the statutory requirement.

[15] The respondent replied that the notices were non-compliant and the learned Sessions Court Judge was correct in her finding and ultimate decision in dismissing the appellant's claim.

[16] The present law on the interpretation of s. 38(4) of the ESA is that as held by the Court of Appeal in *Tenaga Nasional Bhd v. Dunia Raya Enterprise Sdn Bhd* [2015] 6 CLJ 751 where Hamid Sultan Abu Backer JCA stated as follows:

A Jurisprudence Relating To Section 38

[4] The coram consisting of Balia Yusof bin Haji Wahi JCA, Hamid Sultan bin Abu Backer JCA and Badariah binti Sahamid JCA had the opportunity to deal with similar issues in the case of *Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal* [2015] 5 CLJ 955 (Civil Appeal No: A-02-572-2011) and *Tenaga Nasional Berhad v. Ee-Lian Plastic Industries (M) Sdn Bhd* (Civil Appeal No: P-02(NCVC)(W)-201-01-2013) in detail. For good measure, this judgment must be read with that to avoid repetition. What was held by the Court of Appeal in both cases abovementioned can be briefly summarised as follows:

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C (i) conviction is not necessary to claim under s. 38 ESA 1990;

(ii) Tenaga need not prove that the consumer tampered with the meter to succeed under s. 38;

(iii) section 38(3) to (5) only gives some evidential advantage to Tenaga and does not discharge the legal burden to prove its claim when quantum as well as liability is challenged. Once challenged by way of credible evidence, then the trial court is obliged to do a balancing act to see whether Tenaga has discharged the legal burden. The Court of Appeal held as follows:

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> If the action is to be based purely on contract and/or tort, then Tenaga cannot rely on the statutory statement under section 38(4) of which will stand as *prima facie* evidence of quantum of loss of revenue. If section 38(4) is relied upon, it does not stop the defendant from challenging quantum as well as liability. Sections 38(3) to (5) only give some evidential advantage to Tenaga and do not discharge the legal burden to prove its claim when quantum as well as liability is challenged.

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[5] What is important to note under s. 38 is that, Tenaga is not deprived of making a claim against its customers for breach of contract and/or tort for loss of revenue in consequence of a tampered meter. If they do so they must prove that the customer tampered with the meter and in consequence Tenaga suffered loss of revenue. That is to say Tenaga must prove according to law the liability as well as quantum.

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[17] Though not dealt with by the Court of Appeal, the requirements in s. 38(4) are in my view plainly mandatory by the usage of the imperative word "shall" therein. Besides the object and intention of the Legislature in respect of the Enactment must be examined following *Noliana Sulaiman v. PP* [2001] 1 CLJ 36. The object of the provision here is to lighten the onus of proof on the part of the licensee to the disadvantage of the consumers; hence the specified requirement must be strictly complied to safeguard the interest of the consumers that such notices are not simply sent out by unauthorised persons.

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[18] The learned Sessions Court Judge found that both notices of the appellant were non-compliant. I have reviewed both of them.

As to the first notice dated 14 November 2012 sent by the appellant, it was a computer generated letter that did not require signature sent by the Jabatan Perkhidmatan Undang-Undang Tenaga Nasional Berhad. There is no evidence whatsoever that it is a statement by an employee of the appellant duly certified by the appellant. In the premises, the mandatory requirement of s. 38(4) of the ESA is unmet.

Now as to the second notice sent by Messrs Idris & Associates dated 8 April 2014, it is not disputed that it was a letter sent by the solicitors of the appellant. The learned Sessions Court Judge however found and held that the notice was not sent by an authorised person of the appellant. I am unable to agree with the learned Sessions Court Judge because I am of the opinion that a solicitor is in principle qualified as an authorised person. This is plain from the cases of *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 and *United Asian Bank Bhd v. Dyalchands Sdn Bhd & Ors* [1993] 4 CLJ 630 that was referred to the learned Sessions Court Judge. Besides, there is also the Court of Appeal case of *LEC Contractors Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473 where a solicitor's demand was held to be as good as the principal's demand on the performance bond. With respect, I find that the learned Sessions Court Judge took an overly myopic and restrictive view that the cases referred to her only applied to banking cases. She did not consider that the authorised person as intended by s. 38(4) of the ESA simply meant an agent authorised by the licensee. In this sense, a duly instructed solicitor would amply qualify. The aforementioned cases are helpful illustrations of such an intention.

[19] Be that as it may, I agree with the Sessions Court Judge that both notices were nonetheless non-compliant because they did not contain and specifically state particulars of the certification or authorisation by the appellant as well as amount claimed as found required in *Tenaga Nasional Berhad v. Dunia Raya Enterprises Sdn Bhd (supra)* where Hamid Sultan Abu Backer held as follows:

> [6] However, if Tenaga relies on s.38, they need not prove that the customer tampered with the meter. It is sufficient if they can show that the meter has been tampered. In terms of quantum they can rely on certified written statement to establish their case. That does not mean the respondent cannot challenge the quantum. For the appellant to rely on a written statement, the following must have taken place:
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> (i) the appellant must have calculated the loss of revenue and reduce it into a document and written statement;
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> (ii) an employee and/or duly authorised person of the appellant must have perused the document as well as the written statement to certify the written statement;

(iii) the certified written statement must contain the particulars stated in s. 38(4) of ESA 1990;

(iv) for a valid certificate, the name of the employee or authorised person of the appellant must appear in the statement and duly signed;

(v) if a proper certified statement is issued, it needs to be served on the customer and if the customer does not pay, then civil action can be taken. Thus, it is a condition precedent for initiation of civil action in reliance of s. 38 for Tenaga to issue a certified written statement according to law, before civil action can be commenced;

(vi) it must also be noted that as matter of procedural fairness which is part of our constitutional guarantees, the appellant must provide details of the statement if so requested by the respondent. (See *Koperasi Pegawai-Pegawai Kerajaan Negeri Perlis Berhad v. Wan Kiah @ Wan Noriah Mahat & Another* [2013] 1 LNS 750). If details of statement is not provided for, it will in ordinary course create hardship to the respondent to object to the statement and/or part thereof, if the respondent so wishes. Failure to produce the details to the statement will be in breach of rules of procedure and if it is produced for the first time during trial the court is obliged not to admit the said document. Support for the proposition is found in a number of cases and we do not think it is necessary to reproduce it here.

[20] The particulars of the amount claimed are the calculations which should include the period, quantity of electricity loss and charge rate. They must of course ultimately total to the amount claimed in the notice sent by the certified employee of the licensee or an authorised person of the licensee.

[21] For this reason, both notices are non-compliant and therefore do not meet the conditions precedent of s. 38(4) of the ESA.

[22] As the result and in the final analysis, the learned Sessions Court Judge was still right in her answer to the question of law posed that resulted in the dismissal of the suit. In other words, there is no appealable error.

[23] That notwithstanding, the appellant further pointed out as held in *Tenaga Nasional Berhad v. Dunia Raya Enterprises Sdn Bhd (supra)* that the appellant is nonetheless still entitled to pursue its claim either in contract or tort and prove it in the ordinary way. This is however objected upon by the respondent because it was not the appellant's pleaded case that the cause of action is based on breach of contract or in tort. The respondent submitted that the appellant must be bound by its pleadings and the Federal Court case of *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492 was cited in support thereof.

[24] Generally in cases of tampering electricity meters, the aggrieved licensee has three alternative causes of action, *to wit*: statutory civil action pursuant to s. 38(5) of the ESA, breach of contract of supply of electricity or tort, possibly for deceit. Upon careful review of the pleadings filed by the appellant in the suit and candidly conceded by counsel, the appellant's cause of action is premised on s. 38(5) of the ESA.

I noted that James Foong FCJ held as follows in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188:

> [35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

In the premises, the suit cannot be saved from having been dismissed. I make no findings whether the appellant can re-file another suit.

Conclusion

[25] It is for the foregoing reasons that I disallowed the appeal as so ordered.